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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

FEDERAL BARGE LINES, INC., and
GULF-CANAL LINES, INC.,

Petitioners,

versus

ERNEST O. DEFFES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Continental Grain Company, third party defendant below, prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered on the 26th day of May, 1966 in case number 21,868 entitled Ernest O. Deffes vs. Federal Barge Lines, Inc., et al. A rehearing was denied on July 6, 1966.

I.

CITATIONS TO OPINIONS BELOW

The case on the merits was tried to the District Court sitting without jury and judgment was rendered against the plaintiff with written reasons. The opinion of the trial court is presented in Appendix A hereto, *infra* p. 9 and

is reported in 229 F. Supp. 719. The Court of Appeals for the Fifth Circuit reversed and remanded the judgment of the District Court with Judge Jones dissenting. The opinion of the Circuit Court of Appeals is printed in Appendix B hereto, *infra* p. 15 and is reported in 361 F. 2d 422 (5th Cir. 1966).

Rehearing in the Circuit Court of Appeals was denied with Judge Jones again dissenting, without a written opinion.

II.

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on the 26th day of May, 1966. Rehearing was denied on July 6, 1966.

Jurisdiction was vested in the United States District Court by virtue of 28 U.S.C. Section 1332 (a). The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1254 (1).

III.

QUESTIONS PRESENTED FOR REVIEW

(A) Whether a land based grain elevator constitutes such a part of a cargo barge's equipment or appurtenant appliances so as to render the barge unseaworthy if a defect exists in the elevator equipment. Petitioners respectfully submit that the opinion of the Court of Appeals below has erroneously extended the Doctrine of Seaworthiness by adopting a new concept of seaworthiness based on the relationship of equipment in question to the job performed rather than the relationship of the equipment to the vessel. Such a concept violates the basic logic supporting the original Seaworthiness Doctrine and is therefore erroneous.

(B) Whether this enlargement of the Seaworthiness Doctrine which will result in greater conflict between maritime and non-maritime legal principles will provide the desired uniformity in maritime cases.

IV.

STATEMENT OF THE CASE

Ernest O. Deffes sued Federal Barge Lines, Inc., and Gulf-Canal Lines, Inc., as owners and charterers of a hopper type cargo barge for injuries allegedly sustained by him in the course and scope of his employment as a grain handler with Continental Grain Company. He alleges that his injury was sustained while he and his fellow workers were removing grain by means of the grain elevator's land based conveyor belt equipment. He alleges that his injury was sustained as a result of a defect in the conveyor equipment which caused a foreign object to strike him in the eye. The vessel owners and charterers impleaded Continental Grain Company for indemnity and attorney's fees.

The case was tried to the District Court sitting without a jury on questions of negligence of the persons responsible for the vessel and the seaworthiness of the vessel.

The District Court rendered Judgment in favor of the defendants and an appeal was taken by the plaintiff. The Court of Appeals for the Fifth Circuit reversed and remanded the Judgment of the District Court and subsequently denied timely requests for a rehearing.

V.

REASONS FOR GRANTING THE WRIT

The traditional doctrine of seaworthiness has always had one central focal point—the vessel involved. This was reasonable and logical because of the historical evolution

of the vessel's warranty of its own fitness. This point of focus has reasonably definable limits, in simple language they are the boat itself along with its inherent equipment. If a seaman-longshoreman was injured because of a defect in the boat or its equipment, then it was said that the boat or its equipment was not in a seaworthy condition and the warranty was therefore breached.

Recent cases, including the decision of the Fifth Circuit Court of Appeals herein, have completely left this traditional focal point and in so doing have violated the reason and logic which provided a basis for the doctrine of seaworthiness in the first place. Instead of asking if the boat or its equipment is seaworthy the Courts now apparently ask if the man was unloading a vessel, if a defect existed in any equipment related to the injury used in the unloading, and if so, the boat is therefore declared unseaworthy regardless of the relationship of the equipment to the boat. The relationship of the equipment to the job is now tested rather than the relationship of the equipment to the boat. *Cf. Spann v. Lauritzen*, 344 F. 2d 204 (3rd Cir. 1965).

A new concept of the shipowner's responsibility has therefore been created using the absolute obligation of providing a seaworthy vessel as a basis therefore without any regard for the logical and reasonable limits of the doctrine. This reasoning is like arguing that since a parent has an absolute responsibility for the actions of his child, he has the same responsibility for all children even if they are not his. It is respectfully submitted that the fallacy of such an argument is obvious. The focal point of the relationship between the parent and his child has been eliminated but the responsibility remains. This same lack of appropriate relationship can be illustrated within the context of the instant case. The grain handling equipment involved

in the unloading of the barge extends a long way inland and terminates inside the elevator building itself. Personnel are using shovels scooping grain at the far end of this machinery inside the building in the same manner as the plaintiff working at the barge end. The machinery and inside personnel continue to operate while an empty barge is removed and a full barge placed in position for unloading. Suppose one of the inland grain handlers inside the building is injured due to a defect in the conveyor equipment during the time of change of the barges. Which barge will be said to be unseaworthy? Which barge will the conveyor be considered an appurtenance thereof? Where is the appropriate relationship between vessel and equipment?

The District Court below determined in effect that a sufficient relationship did not exist between the equipment and the vessel involved to bring it within reasonable limits of the doctrine of seaworthiness. This finding should not be overturned unless the evidence simply does not warrant such a finding. It particularly should not be overturned on the basis of a newly extended legal concept which no longer logically relates to its original basis.

It is respectfully submitted that the doctrine of seaworthiness should be restricted by this Honorable Court to reasonable limits based on its own definition. If social justice requires the elimination of the limited compensation remedy available to longshoremen then this should be accomplished with proper legislation and not with an ever-increasing fiction of the law.

This new concept of the doctrine of seaworthiness—testing the relationship of the equipment to the job rather than to the vessel involved—will create even greater conflict between maritime and land jurisdictions and result in less uniformity in maritime decisions. The instant case is an example in point. The Continental Grain Company

equipment used to unload barges extends hundreds of feet inland and involves grain handlers, truckers, railroad equipment and employees, and administrative personnel, all of which, while performing their various functions, could be said to be engaged in the service of the vessel since they are assisting in various ways in the process of unloading the vessel. Any of these persons could be injured while a barge was being unloaded. Legal chaos will be created by the conflict of the maritime doctrine of seaworthiness with the various land law principles governing these activities.

A complete new "grey area" is being created at the water's edge. The myriad factual situations available in the "grey area" certainly argues for less uniformity in maritime cases rather than more.

VI.

CONCLUSION

For the above reasons, it is respectfully submitted that this petition should receive favorable consideration and a Writ of Certiorari be granted.

All of which is respectfully submitted.

ADAMS AND REESE

BY: _____
THOMAS J. WYLLIE,
847 National Bank of
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New Orleans, Louisiana,
Attorneys for Continental Grain Co., Third Party Defendant.

CERTIFICATE

I hereby certify that a copy of the above and foregoing Petition for a Writ of Certiorari has this day been placed in the United States Mail, postage prepaid, addressed to Edgar N. Quillan, Attorney for Respondent, 108 Professional Building, Arabi, Louisiana, and to Edmond C. Salassi, Attorney for Petitioners, 225 Baronne Building, New Orleans, Louisiana.

New Orleans, Louisiana, this 12 day of September, 1966.

THOMAS J. WYLLIE

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

No. 11113
Civil Action
Division D

ERNEST O. DEFFES

Plaintiff

versus

FEDERAL BARGE LINES, INC.

Defendant

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AINSWORTH, District Judge:

Plaintiff has sued Federal Barge Lines, Inc., owner of the Barge FBL 625, and Gulf-Canal Lines, Inc., bareboat charterer of the barge, for damages growing out of an injury he sustained while employed by Continental

Grain Company as a grain handler in unloading the barge at a dock in the Port of New Orleans. Defendants have filed a third-party complaint against plaintiff's employer, Continental Grain Company, under the doctrine of *Ryan Stevedor. Co. v. Pan-Atlantic Steam. Corp.*, 350 U.S. 124, 76 S. Ct. 232 (1956). Plaintiff has been paid compensation in full for his injury by his employer, Continental, under the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C.A. 901, et seq.).

On May 27, 1960, plaintiff was working aboard the Barge FBL 625 unloading grain. He claims that while on board he suffered an injury to his right eye from a piece of flying metal thrown from the marine leg used in the unloading operation, which resulted in industrial blindness to the eye. He alleges that the marine leg was defective which made the barge unseaworthy; that the barge owner and charterer failed to provide him with a safe place to work.

The Barge FBL 625 is a "hopper-type" barge of steel-welded construction with steel-rolling covers, 195 feet in length and 35 feet in breadth. It was loaded with a cargo of corn, but was a general classification barge capable of carrying any type of solid cargo. Continental had shipped the corn from St. Paul, Minnesota, to New Orleans under a freight bill and bill of lading in which Continental was both shipper and consignee. Continental loaded and unloaded the cargo.

The evidence showed that the marine leg, which plaintiff alleges caused his injury, is a shore-based elevating conveyor, owned and operated by Continental, used in unloading grain. It is permanently attached to the dock. It is equipped with a conveyor belt on which buckets are attached. The buckets scoop up the grain and carry it from the hold of the vessel to the shore. The unloading oper-

ation is divided into four phases. The first is the lowering of the leg into the hold and resting it on top of the grain. The leg remains, however, attached to and based on shore. The only contact which the leg has with the vessel is that it rests on the grain cargo, has cables attached to the vessel for a period of time and during the sweeping-up operation rests on the bottom of the vessel. The raising and lowering of the leg is done with power furnished by a self-contained unit. Large scoops called "air buckets" are then removed from the leg. These "air buckets" are used to bring the grain from the ends of the barge to the centrally located marine leg. The buckets are operated by means of pulleys, one of which is fastened to the vessel and the other to the marine leg. The pulleys and the cables are part of the equipment of the leg. After the level of the grain is lowered the "air buckets," the pulleys and cables are removed and stored on the marine leg. The third phase of the unloading operation is performed with small bulldozers which do essentially the same task as the "air buckets," that is, bring the grain to the leg. The fourth and final phase is termed "sweeping up." The grain handlers sweep up the grain and shovel it into the marine leg. It was during this phase while plaintiff was shovelling corn into the marine leg that he claims he was injured.

It is settled law that a longshoreman injured while performing a "ship's service" can recover for unseaworthiness. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872 (1946). A vessel is unseaworthy when it has a defect in its "hull, gear, stowage, and appurtenant appliances and equipment." *The Osceola*, 189 U.S. 158, 23 S. Ct. 483 (1903); *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S. Ct. 455 (1944); *Grillea v. United States*, 2 Cir., 1956, 232 F. 2d 919.

An owner of a vessel may be liable for an unseaworthy

condition which has been caused by an independent contractor and the doctrine has been extended to include equipment brought aboard and used and controlled exclusively by stevedores in loading and unloading a vessel. *Alaska Steamship Company v. Petterson*, 347 U.S. 396, 74 S. Ct. 601 (1954); *Rogers v. United States Lines*, 347 U.S. 984, 74 S. Ct. 849 (1954).

We now consider whether or not the Barge FBL 625 was unseaworthy. Plaintiff bears the burden of showing that the alleged defective equipment which caused his injury was a part of the ship's "hull, gear, stowage and appurtenant appliances and equipment." *Mosley v. Cia. Mar. Adra, S. A.*, 2 Cir., 1963, 314 F. 2d 223. He contends that the marine leg was defective and that this rendered the barge unseaworthy. He cites as authority in support of his contention *Petterson, supra*, and *Considine v. Black Diamond Steamship Corp.*, D.C., Mass., 1958, 163 F. Supp. 109. *Considine* would extend the warranty of seaworthiness, as applied to longshoremen, to any equipment aboard a vessel used in the traditional work of loading or unloading a vessel, regardless of what type or to whom it belonged. *Petterson* and *Rogers, supra*, did not go that far. In *Petterson* the defective equipment was a block of a type generally used by a vessel. In *Rogers* the injury was caused by the landfall runner rewinding on the winch drum of the vessel. In *McKnight v. N. M. Paterson & Sons, Ltd.*, 6 Cir., 1960, 286 F. 2d 250, cert. denied 368 U.S. 913, 82 S. Ct. 189 (1961), and *Sherbin v. S. G. Embiricos, Ltd.*, D.C. E.D. La., 1962, 200 F. Supp. 874, the shipowner's warranty of seaworthiness was limited to equipment which was traditionally a part of a ship's appurtenant appliances and equipment. We concur, believing that the test enunciated in *McKnight* and *Sherbin* is the proper one here. Applying that test here, we find that the barge was not unseaworthy, for the marine leg is not equipment tra-

ditionally found aboard and used in unloading operations. This equipment was owned by the stevedore and not by the vessel. It was shore based and shore powered and had only a minimal contact with the vessel.

But plaintiff further contends that Continental's failure to furnish him with goggles for the protection of his eyes violated the Safety and Health Regulations for Longshoring, 29 C.F.R. § 9.1, et seq., thereby rendering the vessel unseaworthy under the authority of *Provenza v. American Export Lines, Inc.*, 4 Cir., 1963, 324 F. 2d 660. Violation of a safety regulation applicable to a stevedore does not render a vessel unseaworthy unless the violation creates a dangerous condition aboard the vessel, which would constitute a defect in the vessel's hull, gear, stowage and appurtenant appliances and equipment. See *Provenza v. American Export Lines, Inc., supra.* Failure of the stevedore to provide plaintiff with goggles did not create a dangerous condition which affected the vessel's hull, gear, etc. For Continental's negligence to be imputed to the shipowner, under the facts here, it must be shown that it knew or should have known by the exercise of reasonable care of the stevedore's negligence. The evidence does not show that the shipowner knew of Continental's negligence. The FBL 625 is a dumb barge and was unaccompanied by any personnel at the time of cargo discharge. The vessel owner exercised reasonable care. It is sufficient here that the barge owner had a reputable firm loading and unloading the barge.

Judgment for defendant.

ORIGINAL SIGNED
Robert A. Ainsworth, Jr.
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana
May 6, 1964

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21868

ERNEST O. DEFFES,

Appellant,

versus

FEDERAL BARGE LINES, INC. and GULF-CANAL LINES, INC., ET AL,

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(May 26, 1966.)

Before JONES and THORNBERRY, Circuit Judges, and SLOAN, District Judge.

THORNBERRY, Circuit Judge: The plaintiff, a stevedore employed by Continental Grain Company (Continental), was injured while unloading grain from Barge FBL 625 which is owned by Federal Barge Lines, Inc. (Federal) and chartered by Gulf-Canal Lines, Inc. (Gulf). Plaintiff sued Federal and Gulf for damages, and the defendants filed a third-party complaint against Continental as the employer of the plaintiff. The district court held for the defendants. 229 F. Supp. 719.

The injury resulted from an alleged defect in a marine leg, a mechanical elevator device, owned by Continental. The marine leg is basically a conveyor belt to which buckets are attached. It is permanently attached to the dock at all times and is designed for use in unloading grain from barges. The power for raising, lowering and operating the leg is supplied by shore-based facilities, and all the equipment used is owned by Continental.

The unloading operation is performed in four stages: (1) The marine leg is introduced through the open hatch of the barge into the grain, and grain is, in effect, "dug" out by the buckets on the conveyor belt. During this stage, there is no contact with the barge. (2) Large scoops, generally called "air buckets," operated by means of pulleys and cables, are utilized to bring the grain from the ends of the barge to the marine leg. The pulleys are attached to the barge at various places by means of hooks and are connected with the marine leg by cables. All this equipment is stored in the marine leg when not in use. (3) When the grain level has been lowered sufficiently, the air buckets are detached and stored and small bulldozers serving essentially the same purpose as the air buckets are brought into use. (4) The last phase of the process is the "sweeping up," during which stevedores sweep up the grain and shovel it into the marine leg. At this stage, the marine leg rests on the bottom of the barge. The injury occurred during this last phase of the unloading.

Plaintiff claimed that a piece of metal from a worn bucket broke off and hit him in the eye. He received compensation from his employer, Continental, under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901. Plaintiff sought recovery against Federal and Gulf on the theory that the allegedly

defective marine leg and the failure of Continental to supply goggles in compliance with the Safety and Health Regulations for Longshoring, 29 C.F.R. § 9.1, rendered the barge unseaworthy.

The district court noted that

> "an owner of a vessel may be liable for an unseaworthy condition which has been caused by an independent contractor and [that] the doctrine has been extended to include equipment brought aboard and used and controlled exclusively by stevedores in loading and unloading a vessel. *Alaska Steamship Company v. Petterson*, 347 U.S. 396, 74 S. Ct. 601, 98 L. Ed. 798 (1954); *Rogers v. United States Lines*, 347 U.S. 984, 74 S. Ct. 849, 98 L. Ed. 1120 (1954)."

Deffes v. Federal Barge Lines, Inc., E.D. La. 1964, 229 F. Supp. 719, 721.

The court, citing *McKnight v. N. M. Paterson & Sons*, 6th Cir. 1960, 286 F. 2d 250, cert. denied, 368 U.S. 913, and *Sherbin v. S. G. Embiricos, Ltd.*, E.D. La. 1962, 200 F. Supp. 874, found that the *Petterson* and *Rogers* cases involved equipment which was "traditionally a part of a ship's appurtenant appliances and equipment." *Ibid.* Since the marine leg was not "equipment traditionally found aboard and used in unloading operations," the court held that a defect in the marine leg would not cause the barge to be unseaworthy.

The court also concluded that a "violation of a safety regulation applicable to a stevedore does not render a vessel unseaworthy unless the violation creates a dangerous condition aboard the vessel, which would constitute a defect in the vessel's hull, gear, stowage and appurtenant appliances and equipment," and that the barge owner had discharged his duty of reasonable care by hiring a reputable

firm to handle the loading and unloading of the barge. *Id.*, 721-22.

The basic question presented on this appeal is whether a defect in a shore-based marine leg can cause a barge to be held unseaworthy. Similar questions have been considered by several courts and have resulted in a sharp conflict between the circuits. The opinion of the district court relies on the Sixth Circuit decision in the *McKnight* case and is also supported by the Second Circuit's opinion in *Forkin v. Furness Withy & Co.*, 2d Cir. 1963, 323 F. 2d 638. The opposite view has been espoused by the Ninth Circuit in *Huff v. Matson Navigation Co.*, 9th Cir. 1964, 338 F. 2d 205, cert. denied, 380 U.S. 943, and by the Third Circuit in *Spann v. Lauritzen*, 3rd Cir. 1965, 344 F. 2d 204, cert. denied, 34 L.W. 3201. After carefully considering these cases and the Supreme Court cases which have developed the doctrine of unseaworthiness, we conclude that the decisions of the Ninth and Third Circuits correctly state the law and that, therefore, the holding of the district court must be reversed.

The doctrine of unseaworthiness was conceived by the Supreme Court in *The Osceola*, 1903, 189 U.S. 158, as a device for imposing liability on ship owners for injuries to seamen. Since that time there has been a steady expansion of the scope and coverage of the doctrine. Thus, in *Seas Shipping Co. v. Sieracki*, 1946, 328 U.S. 85, 89, the Supreme Court considered the question "whether the shipowner's obligation of seaworthiness extends to longshoremen injured while doing the ship's work aboard but employed by an independent stevedoring contractor whom the owner has hired to load or unload the ship." The Court discussed at length the rationale of the doctrine and noted that

"the hazards of marine service which unseaworthi-

ness places on the men who perform it * * *, together with their helplessness to ward off such perils and the harshness of forcing them to shoulder alone the resulting personal disability and loss, have been thought to justify and to require putting their burden, in so far as it is measurable in money, upon the owner *regardless of his fault.* * * * [T]he owner * * * is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost.

* * * * *

"[T]his policy is not confined to seamen who perform the ship's service under immediate hire to the owner, but extends to those who render it with his consent or by his arrangement. All the considerations which gave birth to the liability and have shaped its absolute character dictate that *the owner should not be free to nullify it by parcelling out his operations to intermediary employers whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its service of their historic protection. The risks themselves arise from and are incident in fact to the service.* * * * [The owner's] ability to distribute the loss over the industry is not lessened by the fact that the men who do the work are employed and furnished by another. *Historically the work of loading and unloading is the work of the ship's service,* performed until recent times by members of the crew. * * * That the owner seeks to have it done with the advantages of more modern divisions of labor does not minimize the worker's hazard and should not nullify his protection.

* * * * *

"It seems, therefore, that when a man is performing a function essential to maritime service on board a ship the fortuitous circumstances of his employment by the shipowner or a stevedoring contractor

should not determine the measure of his rights."

Id. at 93-97. (Emphasis added).

The Court also found that the stevedore's remedy for unseaworthiness against the shipowner was in addition to his statutory remedy against his own employer. *Id.* at 100-02.

The coverage of stevedores under the doctrine of unseaworthiness was further developed in *Alaska Steamship Co. v. Petterson and Rogers v. United States Lines, supra.* The stevedore's injury in *Petterson* was caused by a defective block which the Court assumed had been brought on board the ship by the stevedoring company. The Ninth Circuit found the vessel to be unseaworthy, *Petterson v. Alaska Steamship Co., Inc.*, 9th Cir. 1953, 205 F. 2d 478, and the Supreme Court affirmed per curiam, citing *Seas Shipping Co. v. Sieracki, supra,* and *Pope & Talbot v. Hawn*, 1953, 346 U.S. 406. In *Pope*, the Supreme Court had reaffirmed *Sieracki* and stated that "Sieracki's legal protection was not based on the name 'stevedore' but on the *type of work* he did and its relationship to the ship and to the historic doctrine of seaworthiness." *Id.* at 413. (Emphasis added.) The injured man in *Pope* was a carpenter who was repairing the loading apparatus and was hurt when he fell through an uncovered hatch hole.

The Third Circuit in *Rogers* was concerned with an allegedly defective land fall runner, a device used in unloading cargo. In its discussion, the court stated:

> "Admittedly then, the alleged unseaworthy condition was not created by the ship. The runner was owned, produced and fastened to the winch by Lavino [the stevedoring company], which was in charge of and performing the unloading operation. And there is no indication that the ship sanctioned

> its use or even knew of its existence. *The statement that the vessel adopted the runner as an appurtenance is simply not justified by the record.* * * * Since the wire alone or the manner in which it was handled, or both, caused plaintiff's hurts and since under the facts the presence of that wire cannot be construed as appellee's responsibility this judgment [for the defendant] should not, for the reason urged, be disturbed."

Rogers v. United States Lines, 3rd Cir. 1953, 205 F. 2d 57, 57-58. (Emphasis added.) The Supreme Court reversed per curiam. 347 U.S. 984. Three justices dissented in both the *Petterson* and *Rogers* cases on the theory that the doctrine of seaworthiness as stated in *Sieracki* should not be extended to cover "the unseaworthiness of equipment owned and brought on board by a stevedoring contractor * * * *" since the stevedoring company would be better able to eliminate the hazard. 347 U.S. at 401-02.

The seaworthiness doctrine was further extended by the Supreme Court in *Gutierrez v. Waterman Steamship Corp.*, 1963, 374 U.S. 206. In that case, a longshoreman had slipped on beans spilled on the dock from defective bags during the unloading of cargo. The Court reiterated *Sieracki's* position that the "Seaworthiness is not limited, of course, to fitness for travel on the high seas; it includes fitness for loading and unloading," *id.* at 213, and found that the doctrine of seaworthiness applies to "longshoremen unloading the ship whether they are standing aboard ship or on the pier." *Id.* at 215.

Since the district court's opinion relies primarily on the decision in the *McKnight* case, we must first look to that case. McKnight, a longshoreman, was injured by unloading gear which was being lowered into the ship's hold by a shore-based crane. While the Sixth Circuit and

the district court conceded that the plaintiff "might have been doing the traditional work of a seaman." (i.e., unloading cargo), both courts concluded that "he was not incurring the hazards of a seaman, in that none of the traditional unloading gear of the ship, namely winches, masts, or booms, was being used. * * * " 286 F. 2d at 251, 181 F. Supp. at 440. The courts distinguished the Supreme Court decisions in *Sieracki*, *Rogers* and *Petterson* on this basis but cited no case to support this distinction.

Our reading of the Supreme Court cases leads us to a contrary conclusion. Loading and unloading is clearly held to be "work of the ship's service." *Sieracki, supra; Crumady v. The Joachin Hendrik Fisser*, 1959, 358 U.S. 423, 427; *Italia Societa v. Oregon Stevedoring Co.*, 1964, 376 U.S. 215, 323. *Pope & Talbot v. Hawn, supra*, instructs us to look to the *type of work* performed to determine the extent of liability under the doctrine of seaworthiness. Here we have a claimant who was admittedly injured while unloading a cargo of grain. Therefore, there can be no doubt that he is within the scope of the doctrine.

The district court below and the *McKnight* case would exclude the plaintiff here from recovery because, although he was doing seamen's work, he was not incurring a seaman's hazard since he was not using gear traditionally found aboard ship. The Supreme Court in *Sieracki*, however, attempts to negate this type of limitation on the concept of seaworthiness. As stated there, the shipowner "is at liberty to conduct his business by securing the advantages of specialization in labor and skill brought about by modern divisions of labor. He is not at liberty by doing this to discard his traditional responsibilities." 328 U.S. at 100. *McKnight* and the district court would permit the shipowner to escape liability merely by substituting a more

modern method for performing the traditional work of a seaman. We can find no support in the Supreme Court cases for adopting such a position. Nor can we find a rational basis for drawing this distinction. If one is performing seamen's work, by definition he must be subjecting himself to a seaman's hazard, no matter what type of equipment he is using to do the work. "The risks themselves arise from and are incident in fact to the service. * * *" *Sieracki, id.* at 95. If a seaman were injured in the engine room of a nuclear-powered vessel by some defect in the reactor, he could not recover under the rationale of *McKnight* and the district court, even though he was performing traditional seamen's work, because the shipowner had installed apparatus which had not traditionally been found on board ships. Such a result would be completely out of harmony with the Supreme Court's conception of the doctrine of seaworthiness.

The district court in *McKnight* found an additional basis for denying relief not used by the district court in the instant case. It concluded that the shore-based crane was not part of the hull, gear or stowage of the vessel, and, therefore, a defect in the crane or a fault in its operation could not make the ship unseaworthy. Again, the court cited no authority to support its conclusion. This reasoning also flies in the face of the Supreme Court opinions. The Third Circuit attempted to draw the same distinction in the *Rogers* case. 205 F. 2d at 57. The Supreme Court reversed per curiam. In the *Petterson* case, the Ninth Circuit assumed that the defective block belonged to the stevedoring company and that it had been brought on board by the stevedores. 205 F. 2d at 479. The Supreme Court affirmed per curiam. The case at hand cannot be distinguished from the *Rogers* and *Petterson* cases on a rational basis. All three cases involved stevedore com-

pany equipment brought on board to assist in loading or unloading cargo. The mere fact that the marine leg is larger than a block *(Petterson)* or a land fall runner *(Rogers)* should not cause a different application of the law.

The courts in *McKnight* and *Forkin* attempted to draw further distinctions. They suggest that liability should not be imposed unless the injuring device is attached to or touching the ship. *McKnight*, 181 F. Supp. at 439 and n. 9; *Forkin*, 323 F. 2d at 641. This limitation finds no support in the Supreme Court cases. As stated by the Ninth Circuit in *Huff*, this approach is "manifestly wrong and contrary to the controlling decisions. * * * " 338 F. 2d at 215. Even though it is admitted here that the marine leg at one stage in the process is attached to the barge and was at the time of the injury resting on the bottom of the barge, we join the Ninth Circuit in rejecting this purported exception to the doctrine of seaworthiness.

The opinions in *McKnight* and *Forkin* confuse the issue by introducing concepts of negligence into their consideration of the seaworthiness question. They infer that the shipowner's power of inspection, 323 F. 2d at 641, or his lack of control, 181 F. Supp. at 439, have relevance to the problem. This position, however, was clearly rejected by the Supreme Court when it stated in *Sieracki* that "liability is neither limited by conceptions of negligence nor contractual in character," 328 U.S. at 94, and when it concluded in *Mitchell v. Trawler Racer, Inc.*, 1960, 362 U.S. 539, that "we can find no room for argument as to what the law is. What has evolved is a complete divorcement of unseaworthiness liability from concepts of negligence."

Several months after judgment was rendered below, the opinion of the Ninth Circuit in *Huff v. Matson Naviga-*

tion Co., 9th Cir. 1964, 338 F. 2d 205, was handed down. Huff was also injured by the operation of a marine leg. The Ninth Circuit made a very thorough analysis of the Supreme Court cases and the decisions of the Sixth Circuit in *McKnight* and the Second Circuit in *Forkin*. It found the distinction drawn in *McKnight* that the longshoreman was not incurring a seaman's hazard because the gear was not that traditionally used in unloading to be invalid. The Court concluded that the shipowner's absolute liability

> "for the results of defects in unloading equipment brought on board ship by the stevedoring company should not be qualified or modified if the unloading equipment thus used happens to be newly designed and devised and involves none of the traditional unloading gear of the ship. Use of more modern equipment can no more exculpate the shipowner from his obligations than could use of 'more modern divisions of labor.' [Sieracki] It would seem passing strange of the shipowner, whose obligation of seaworthiness, as stated in Sieracki, 'is peculiarly and exclusively the obligation of the owner * * *;' could in effect delegate and avoid his obligation by employing a stevedoring company which used newly invented unloading devices."

The Third Circuit in *Spann v. Lauritzen*, 3rd Cir. 1965, 344 F. 2d 204, followed *Huff* and extended its holding considerably. The defective equipment in that case was a hopper located *on the pier*. A shore-based crane would scoop buckets of nitrate from the hold of a ship and empty them into the hopper. Trucks would drive under the hopper and a lever would release the contents of the hopper into the truck bed. The plaintiff was injured when a defective release mechanism caused the lever to descend prematurely and strike him. The Court agreed with the conclusion of the "Ninth Circuit in the *Huff* case that *McKnight* and *Forkin* are out of harmony with the principles

announced by the Supreme Court" and allowed the plaintiff to recover. *Id.* at 209.

The analysis of *Huff* and *Spann* and the failure of the lower court and the courts in *McKnight* and *Forkin* to demonstrate a valid distinction as a basis for a limitation on the broad doctrine of seaworthiness as enunciated by the Supreme Court convinces us that a defective marine leg used in unloading grain makes a barge unseaworthy. Because of this conclusion, we find it unnecessary to consider the appellant's other contentions.

The judgment of the district court is reversed and the case is remanded for proceedings not inconsistent with this opinion.

Federal and Gulf, appellees, and Continental, third party defendant-appellee, have stipulated that in the event attorneys fees for the appeal of this case are awarded in favor of Federal and Gulf and against Continental, the amount should be set at $900. Since this case is being reversed and remanded, the District Court will have before it such stipulation for whatever action it deems appropriate.

JONES, Circuit Judge, Dissenting

In the opinion of the majority, it is shown that:

> "The injury resulted from an alleged defect in a marine leg, a mechanical elevator device, owned by Continental. * * * It is permanently attached to the dock. * * * The power for * * * operating the leg is supplied by shore based facilities. * * * The injury occurred during this last phase of the unloading."

The end of the marine leg rested on the bottom of the barge. I do not see how it became a part of the barge merely by touching it.

I see no reason for this extension of the doctrine that a longshoreman is a seaman and equipment affixed to the shore is a part of a vessel. I would relegate the appellant to the remedy provided by the Longshoremen and Harbor Workers Compensation Act rather than impose a liability for negligence upon his employer by way of indemnity of the ship owner. Therefore, I DISSENT.